TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 567.

WILLIAM H. ELLIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 16, 1907.

(20,532.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 10, 1907.

a District Court of the United States, District of Massachusetts.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

Writ of Error.

Boyd B. Jones, Attorney, Exchange Building, Boston, Mass. for Plaintiff in Error.
Asa P. French, United States Attorney, for Defendant in Error.

b UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, in a cause entitled United States by Indictment, *versus* William H. Ellis Defendant, Number 444 a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the third Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, the twenty second day of December in the year of our Lord one thousand nine hundred and six.

FRANK H. MASON,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

c District Court of the United States, District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I Frank H. Mason Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this tenth day of January A. D. 1907.

[Seal of the District Court, Massachusetts.]

FRANK H. MASON, *Clerk.*

1 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts on the first Tuesday (being the fourth day) of December in the year of our Lord one thousand nine hundred and six.

Before the Honorable Frederic Dodge, Judge.

THE UNITED STATES OF AMERICA BY INDICTMENT
versus
WILLIAM H. ELLIS.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that William H. Ellis of Boston in said District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust, to work, and said De Gaust did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said De Gaust on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

2 And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said

District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, Solomon Moore, to work, and said Moore did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said Moore on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said District at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, James Harris, to work, and said Harris did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said Harris on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, William McDonald, to work, and said McDonald did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, *then* being then and there no extraordinary emergency requiring the employment of said McDonald on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

This Indictment was found at the September Term, A. D. 1906 of this Court. And now on the fourteenth day of September, nineteen hundred and six, the said Defendant was set to the bar, and had said Indictment read to him, and for plea he said that thereof he was not guilty, and for trial put himself upon the country.

On the sixteenth day of October, nineteen hundred and six, the United States Attorney for this District came and said "I will no further prosecute the third (3d) and fourth (4th) counts of this Indictment."

4 Thereupon, on said sixteenth day of October, nineteen hundred and six, a jury was duly impanelled and sworn to try the issue, videlicet; Bertram Lord, foreman, and fellows, videlicet; Thomas F. Morris, Charles M. Parker, John E. Perkins, A. Myron Ramsdell, Cyrus Ricker, Albert H. Stone, Thomas Stothart, Albert H. Chaffee, John E. Gleason, Frederick T. West, and William H. H. Bryant.

On the eighteenth day of October, nineteen hundred and six, this cause was committed to the jury who after hearing all matters and things concerning the same, returned their verdict therein, and upon oath said, that of the first two counts of said Indictment the said Defendant was guilty.

From said September Term, nineteen hundred and six, this Indictment was continued to this present December Term, when on the twenty-second day of December, nineteen hundred and six, the following Bill of Exceptions is filed in open Court, and allowed, Defendant being present.

Defendant's Bill of Exceptions.

At the September term of the District Court of the United States for the District of Massachusetts, sitting at Boston within said District, the grand jury returned an indictment in four counts against said William H. Ellis charging violations of the Act of August 1, 1892, chap. 352, (27 Stat. L. 340), limiting the employment of mechanics upon any of the public works of the United States to eight hours in any one calendar day, except in case of extraordinary emergency.

The United States Attorney, with the consent of the Defendant, nol-prossed the third and fourth counts.

The first count charged in appropriate terms the employment of a mechanic therein named upon the construction of a public work known as Pier No. 2 at the United States Navy Yard at said Boston, on the thirteenth day of June, 1906, in violation of said act.

The second count differed from the first count only in the name of the mechanic.

5 On the fourteenth day of September, 1906, the Defendant pleaded not guilty to the entire indictment. Trial was begun on the sixteenth day of October, 1906, and finished on the eighteenth day of the same month. The verdict of the jury was guilty on both counts.

It was admitted that the pier in question was authorized by the Act of March 3, 1905, the appropriation therefor being expressed in the following language: "Navy Yard, Boston, Massachusetts. Approach to Dry Dock No. 1, $43,100."

The Defendant did not require proof of the fact that he was a contractor within the meaning of the Act of August 1, 1892, or that the construction of pier No. 2 was a public work as charged in the indictment, or that the mechanics named in said counts were permitted to work on said public work for more than eight hours each on said thirteennth day of June, 1906, with his knowledge and approval.

The United States introduced in evidence the contract dated October 13, 1905 between the United States and the Defendant for the construction of the pier in question.

This contract provides:

"First. That the said party of the first part will provide, furnish, and deliver, at his own risk and expense, at the United States Navy Yard, Boston, Massachusetts, all the necessary materials, labor, tools, and appliances for the construction and completion in all respects, of a pile and timber pier to be known as Pier No. 2, at said Navy Yard, and will construct and complete the same and do the required dredging within six calendar months from the date of this contract, in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto and forming a part hereof, for the sum of thirty-six thousand four hundred and seventy five dollars ($36,475.), plus thirty cents (30 cents) per cubic yard of material dredged."

General provisions 5, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 36 of the specifications are as follows:

"5. *Control of work.*—The United States, by its officer in charge of the work or other authorized representative, shall at all times have full control and direction of all work under the contract, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer or representative, subject only to appeal to the Chief of the Bureau of Yards and Docks."

"7. *Employees.*—The contractor shall employ only competent, careful, orderly persons upon the work, and if, at any time, it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless, or disorderly, or disobeys or evades orders or instructions, or shirks his duty, such person shall be immediately discharged from and not again employed upon the work. No person undergoing sentence of imprisonment at hard labor shall be employed on the work to be done under this contract."

6

"8. *Time of commencement of work.*—The contractor shall commence work immediately after the execution of the contract and continue without interruption, unless otherwise directed by the United States by its officer in charge of the work or other authorized representative, or otherwise hereinafter provided."

"9. *Time of completion.*—The entire work shall be completed in

every respect and particular within six calendar months from the date of the contract."

"10. *Extension of time.*—Extensions of time for the completion of the work may be allowed and made, in writing, by the Chief of the Bureau of Yards and Docks. Any and every extension of time must be specifically made and shall not be implied from any cause under any circumstances."

"11. *Continuance of work after time.*—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by this contract, said work shall continue and be carried on according to all the provisions of said contract, plans, and specification, unless otherwise at any time directed by the party of the second part, in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms: *Provided,* That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the party of the second part of its right to annul or terminate said contract for abandonment or failure to complete within the time specified in paragraph 9, or to impose and deduct damages as hereinafter provided."

"12. *Damages for delay.*—In case the work is not completed within the time specified in paragraph 9, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 10 of this specification, it is distinctly understood and agreed that deductions at the rate of $10 per day shall be made from the contract price as liquidated damages, and not as penalty, for each and every calendar day after and exclusive of the date within which completion was required, up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon in advance as the measure of damages to the United States by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

"13. *Unavoidable delays.*—Unavoidable delays are such as result from causes which are undoubtedly, or may reasonably be presumed to be, beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence) fortuitous events, inevitable accidents, etc. Delays caused by acts of the United States will also be regarded as unavoidable delays. Should the progress of the work be, or seem likely to be, delayed at any time by such causes, the contractor shall at once notify the officer in charge, in writing, of the occurrence, in order that a record of the same may be made. Should it be decided that the delay was unavoidable, a corresponding extension of time for the completion of the work may be allowed, but it is distinctly understood that should the contractor fail or neglect to notify the officer in charge as above provided, such omission shall be construed as a waiver of all claim and right to an

extension of time for the completion of the work on account of such delay."

7 "14. *Avoidable delays.*—Avoidable delays are such as result from causes which the contractor might, by care, prudence, or foresight, have guarded against or prevented. No extension of time will be allowed on account of such delays.

"15. *Progress of work.*—If at any time the progress of the work shall, in the opinion of the officer in charge, appear to have been such as to indicate that the work is not likely to be completed within the time allowed, he shall report such opinion to the Chief of the Bureau of Yards and Docks, who may, in his discretion, declare the contract null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof."

"36. *Piles.*—All piles, excepts as mentioned below, shall be sound, straight, long-leaf yellow pine, not less than 8 inches in diameter at the point and 12 inches in diameter at a point 5 feet from the butt. All yellow-pine piles shall be creosoted with at least 16 pounds of creosote per cubic foot of pile. All bollards and fender piles, all end-bearing piles in each bent, all brace piles, and all piles in the off-shore end bent and in each outer corner shall be of white oak, sizes as specified for yellow-pine piles. Sizes specified above are for piles exclusive of bark. Piles shall be sufficiently straight so that a line joining the center of each end shall fall entirely within the pile."

The construction of the pier required 311 pine piles and 366 white oak piles. The pier in question was completed in the week ending October 13, 1906. It is a little more than 500 feet long and about 50 feet wide. The contract called for the demolition of an old wharf which extended out about 200 feet and occupied a portion of the space occupied by pier No. 2. Pier No. 2 is an approach to dry dock No. 1, and is to the right of a vessel approaching that dock. To the left of the approach to dry dock No. 1 is pier No. 1, which was finished about three years ago. Dry dock No. 1 was completed in 1835 and has been in use from then until the present time. There is another and larger dry dock at the same Navy Yard, which was completed last year.

FRED THOMPSON, a witness called by the United States, testified as follows:—

I am a civil engineer in the navy, and have been connected with the Boston Navy Yard fifteen months. I have charge of all works of construction outside of repairs to ships, including the charge of construction and improvements of wharves, quays, piers, streets, water works, electric lighting, etc. in the Navy Yard. Before I came to Boston, I was six years in the Norfolk Navy Yard and eight months at the New York Navy Yard. The construc-

8 tion of pier No. 2 was under my charge, and I looked over the work while it was going on once or twice a day.

In reply to questions propounded by the United States Attorney the witness testified as follows:

Q. That pier has been referred to and styled in the specifications

and in the Act making the appropriation as an approach to dry dock No. 1. Will you state what is meant by an approach to a dry dock?

A. Well, it is the custom in the N-vy Yards of this country to have wharves or piers on each side of the entrance to a dry dock extending out 150 or 200 feet, or may be more, which are for the purpose of warping ships so that they can be easily docked.

Q. I have not come to that yet. These (indicating on plan) are what are called approaches?

A. Yes.

Q. Dry docks are sometimes built without approaches?

A. Yes.

Q. Sometimes with a single approach?

A. Yes.

Q. And sometimes with a double approach; is that true?

A. Sometimes without any——

Mr. JONES: That refers to the present time?

Mr. FRENCH: Yes, to the present time.

The WITNESS: I can't answer that exactly, because there are dry docks building now in this country in the Navy Yards which have no approaches at all.

* * * * * * *

Q. Now will you describe how this pier, or such a pier, is used in docking vessels?

A. The ship is brought towards the entrance of the dock, for instance, at a convenient time, and moored up along-side of this wharf, and then when the tidal conditions are proper the caisson is taken out, the dock is flooded and the ship is put into the dock and her lines are handled from the approaches on each side of the dock, and she is pointed in through the moorings on both sides of the entrance. That is the use of the wharf for docking ships.

Q. How long do you say you were at the Navy Yard at Boston before this pier was constructed?

A. Well, the pier has only been finished this last week. I have been here 15 months.

Q. During that time have vessels been docked in dry dock No. 1?

9 A. Yes.

Q. How many should you say—about how many?

A. Oh, I should say fifty.

Q. Have they been so docked with safety?

Mr. JONES: One moment. If he means by that without injury to the vessel, I do not object.

Mr. FRENCH: Without injury.

A. So far as I know there have been no injuries.

Q. Can vessels be docked without any approach to the dry docks?

A. Yes.

Q. Can they be docked without injury?

A. Yes.

Q. What can be done by reason of the existence of this pier,—

Pier No. 2,—that could not have been done before with respect to the docking of vessels?

A. Nothing.

Q. What then is the purpose of the pier? How does it help, if at all?

A. The pier serves as additional wharfage facilities in the Yard for furnishing ships with supplies, and at the same time it makes the docking of ships in the dock safer, probably more economical and at a less expense to the Government than otherwise.

Q. That is to say, it facilitates the docking of the vessel?

A. It facilitates the docking of the ship.

Mr. JONES: Makes it safer is what he said, Mr. French.

Q. It makes it safer?

A. Yes, safer.

Q. And cheaper?

A. I think so.

Q. And it can be done somewhat more rapidly?

A. I think so.

On cross examination the witness testified as follows:—

(By Mr. JONES:)

Q. Mr. Thompson, perhaps I did not get your official title in the Navy Yard?

A. Civil Engineer.

Q. And as civil engineer it was your duty to see that the terms of this particular contract were complied with?

A. Yes, as far as contained in the contract and specifications.

Q. That is all I meant. I wanted to bring that fact out.

A. Yes.

Q. And for that reason from time to time, and from day to day, you saw this work going on?

A. Yes.

Q. So that you were familiar with the work itself, and with the progress of the work?

A. Yes, sir.

Q. And in a general way knew the conditions of the work, knew that men were being employed on the work, and knew that they were being employed more than 8 hours in each calendar day?

A. Yes.

Q. And then at some time, and I think brother French has given us the date of July 30th, there was some disturbance arising from the fact that Mr. Ellis was letting men work there 9 hours a day. You were aware of that, were you?

A. Yes.

Q. But until July 30th, or just about that time, so far as you knew there was no complaint or disturbance arising from the fact that he did let men work there more than 8 hours a day?

* * * * * * *

A. There had been no complaints at all.

Q. If you smash a vessel or hurt her and can't get at her in the water, you take her into the dry dock and let the water out and get at the vessel for repairs?

A. Yes.

Q. And I take it these dry docks were used for the purpose of repairing the United States vessels?

A. Yes.

Q. Now, in getting a vessel into Dry Dock No. 1, by means of those approaches, you would use warps,—you would warp her in, would you?

A. Yes.

Q. And by warping in do you mean that great ropes would be attached to the sides of the vessel and passed around belaying pins on the approaches, and that men would pull on those ropes and move the vessel along steadily, smoothly and evenly into the Dry Dock No. 1?

A. Yes.

Q. And it was important that that vessel should be guided into that Dry Dock No. 1 in an easy, direct manner, without its colliding with any structure or the shore—that it should enter it directly—was it not?

A. Yes.

Q. Now, these piers on either side, when completed, have a smooth surface?

A. Yes.

Q. And they are at an elevation above the water, which is fixed by the terms of the contract?

A. Yes.

Q. And in fixing that elevation you have in reference the uses to which the pier is to be applied?

A. Yes.

11 Q. Now, in pulling one of those vessels—I say "pulling"—I presume you would say "docking" it—but you know what I mean—in pulling one of those vessels into that dock, there is less liability if you have an approach at a proper elevation and approved surface, and a smooth surface, than if you have an inconvenient elevation and a rough surface?

A. Yes, certainly.

Q. These dry docks are for the purpose of repairing the United States vessels?

A. Private vessels have been docked in there, but only in cases where its use is not necessary for Government vessels.

Q. I mean that the primary purpose——

A. The primary purpose is for the United States use, of course.

Q. And if two vessels, war vessels, of the North Atlantic Squadron do you have such a squadron?

A. Yes.

Q. — should collide with each other, and each of them should be damaged and need repairing, that would be one of the purposes for which these dry docks would be applied?

A. Yes.

Q. And is it a fact that, in a naval sense, this Navy Yard is the home of the North Atlantic Squadron, the place at which it would naturally put up for repairs?

A. I think so, yes, naturally, Boston and Portsmouth, Boston preferably.

Mr. JONES: I suppose if they happened to be out in New York Harbor, and ran into each other off Hell Gate, they wouldn't bring them on to Boston, but would put into the Navy Yard nearby.

Q. That is so, is it?

A. They took the squadron from off Provincetown last week, or last month, and sent them down to New York or Norfolk.

(By Mr. FRENCH:)

Q. For repairs?

A. Yes. It was pretty much rush work here.

On cross examination also this witness described the method and manner of constructing the pier.

The witness further testified in cross examination.

Q. Now, then, during the progress of this work, Mr. Thompson, was it pushed as vigorously and expeditiously as it could have been to a completion?

12 The WITNESS: I should say that the work was pushed to completion as soon as could be. They used every effort to complete the work as rapidly as possible.

Q. Including working over time?

A. Including working over time.

On re-direct examination the witness testified as follows:—

(By Mr. FRENCH:)

Q. Now you have said on cross examination that there was greater safety in the docking of United States vessels by reason of the construction of this pier than there would have been without it. Did you mean safety to human life or limb, or safety to the vessel?

A. I should say safety to the vessel.

Q. But I supposed when you said it was safer you meant to use the term relatively? In other words, you have already said, I think, that vessels could be docked with safety in the exercise of proper care without the approach; that is true, isn't it?

A. Yes.

Q. Was it requisite or necessary for the *d*afety of the vessels that this pier, or one like it, should be constructed. The answer to that *i*t "yes" or "no." Was it essential to the safety of vessels that this pier should be constructed or not?

A. I will say no, it was not essential.

Q. Will you go any farther than to say that it was desirable?

A. I should say it was desirable, desirable to have this pier constructed for the safe docking of ships.

On re-cross examination the witness testified as follows:—

Q. Now, from the standpoint of a man of prudence, having in

mind, Mr. Thompson, the nature and value of the vessel to be docked, having in mind the amount of damage or pecuniary loss which may result from an injury to the vessel in docking, having in mind the possible needs of repairing vessels quickly as occasion for repair may require, was the approach in question, Pier No. 2, or some equivalent provision for docking vessels, reasonable necessary for their safe and speedy docking? Did you catch my question?

A. Yes. I should say that the construction of the pier was reasonably necessary for the safe docking of ships, the safe and economical docking of ships.

On re-direct examination the witness further testified:—

13 "Do you mean by that Mr. Thompson, it would require fewer precautions in docking of a ship with this pier than without it, in order to insure safety?"

Q. Is that substantially what you mean?

A. I do not think we would take any fewer precautions at all. We would have to take all the necessary precautions possible in any case.

Q. Perhaps you do not understand my question. You have already testified that you can dock ships safely without any approaches at all, haven't you?

A. They can be docked, yes.

Q. Safely without approaches?

A. Yes.

Q. You have stated, in substance—if you have not you will correct me—that ships could be docked in safety by using sufficient precautions without this pier—that you said?

A. Yes.

Q. You have already expressed an opinion that the construction of this pier, or one like it, was not requisite to the safe docking of ships; you have also, in response to a question of Mr. Jones, said that the construction of the pier was, in your opinion, reasonably necessary for the safe docking of ships?

A. Yes.

Q. I ask what distinction you make, what difference you suppose the question to include to which you answered it was not requisite or necessary, and to which you answered that it was reasonably necessary for the safe docking of a ship? What do you mean by "reasonably necessary"?

A. I mean that ships have been docked there since 1836 without this pier.

Q. And docked safely?

A. Yes. Now that this pier is constructed it adds a great deal to the safety of the docking.

Q. By "safety" do you mean facility?

A. Facility of docking, and safety of the ship. I should consider that the construction of the pier was a reasonable necessity, but not an absolute necessity; but it was a reasonable necessity

Q. Can you dock a ship more rapidly by reason of this pier?

A. I think so.

Q. And more easily?
A. Yes.
Q. More economically?
A. Yes.
Q. And with less risk to the vessel?
A. Yes, I think so.
Q. And when you have said that you have said all that
14 is to be said with regard to it, haven't you, practically?
A. I think so.

On re-cross examination the witness testified as follows:

(By Mr. JONES:)

Q. And so, so far as safety is concerned, the approach is reasonable necessary, but not absolutely necessary, as you have already told brother French.

A. I would rather put it in the way that it was desirable. A thing is really necessary I suppose if it is necessary. It is desirable; it is desirable to have that pier there for docking ships.

Q. Very desirable?
A. Very desirable.
Q. For the safe docking of ships?
A. Yes.
Q. And very desirable because it lessens the danger of a great loss and damage to the ships?
A. Yes.

SETH PERKINS, a witness called by the Defendant, testified as follows:

I have been a civil engineer and contractor for 30 years; have had experience on work similar to pier No. 2. In 1906 I was associated in business with the Defendant, and the construction of pier No. 2 was under my particular supervision. The Defendant knew that the men were employed on that work more than 8 hours on June 13, 1906. On that day I was pushing the work to completion in all ways as rapidly as I could, including overtime working. The Defendant was then employing on the construction of the pier all the men that could be worked there to advantage, and was doing everything that could be done to complete it as rapidly as possible.

Q. Could you have proceeded with equal advantage and with equal rapidity in the construction of the work if you had employed more men 8 hours than you were then employing 9 hours?

A. No sir; we could not put any more men on to do the work in the space we had to work in. There had been delays in obtaining the piles required by the contract and supplemental contract which we did not anticipate at the time we entered into the contract. The contract required 311 pine piles and 17 more for additional work.

Q. At the time the contract was signed was there any difficulty anticipated in obtaining those pine piles?

A. We simply knew that it would take quite a while to get them.

15 Q. Well, did you think you could get them seasonably?

A. We thought possibly we might; there was a chance. But we couldn't.

We found that we could not obtain the long-leaf piles, that nobody would guarantee to furnish them anywhere near reasonable time, as it was an impracticable thing to creosote long-leaf yellow pine. That information was communicated to the representatives of the United States as soon as we received it, and they decided sometime in January to allow us to substitute short-leaf pine piles for the long-leaf. We then made every possible effort to obtain the short-leaf as quickly as possible, and accepted the first offer that we got to furnish the short-leaf pine in the speediest manner possible. The party supplying it said they could get it in 60 days from the date of the order; but they failed to do so, and we did not get the short-leaf pine until the first week in June, 1906, after repeated efforts to hurry them up.

The white oak piles required by the contract were 366. We undertook immediately to secure the white oak piles, and corresponded with everybody that we knew of in the market for the delivery. We found unexpected difficulty in obtaining them. They were of a dimension which the pile men claimed did not grow except very rarely. One of our correspondents called them freaks. It was impossible to get them; still they could be obtained by culling over large areas. We placed at the earliest moment the first order that we believed would give us the required oak piles in the shortest time and in the surest manner. The first delivery came about the middle of February, 25 in all; in March 66; in April 51; in May none; in June 80. The first delivery in June was the 19th. We received 49 in July; 75 in August; and 25 in September. We would have been ready to have driven our piles 4 or 5 weeks after October 13, 1905 if they had been here.

April 10, 1906 we received the following letter from the representative of the United States:—

16 "Mr. W. H. Ellis, No. 17 Milk St., Boston, Mass.

SIR: Replying to yours of the 3rd inst. requesting an extension of time on your contract for the construction of Pier No. 2; I will state that the Bureau of Yards & Docks has decided that the matter will be held in abeyance pending the completion of the work, at which time the Bureau will make such extensions as the circumstances warrant.

Very respectfully, FRED THOMPSON,
Civil Engineer, U. S. N."

On cross examination by the United States Attorney, the witness testified as follows:

I advised with the Defendant about taking the contract. We read it and the specifications, examined the plans, and made the estimate. We knew that in order to comply with its terms we had got to construct the pier in accordance with the specifications and plans and that, subject to the damage clause, the work had got to

be done in six months from the date of the contract. We understood the number and dimensions and quality of the piles to be provided, had bought piles before, and it was a part of our business to be familiar with the pile market.

(By Mr. FRENCH:)

Q. And information as to the market for piles is as readily accessible, generally speaking, as information as to the market for any other commodity, is it not?

A. Within reasonable limits.

Q. So when you entered into this contract you were not entering into a blind thing?

A. Not absolutely; no, sir.

Q. You were taking your chances, however, of some inconveniences and delays, were you not?

A. There are always those chances to take.

Q. And when you undertake a contract you take it subject to those chances, of course?

A. Always.

Q. Realizing that they exist?

A. Always, and try to reduce them to a minimum.

Q. Certainly; you do the best you can, but take your chances?

A. Yes.

Q. Now will you state a little more explicitly than you have done, and assuming for the moment that it is law that delay in the furnishing of piles, or material of any kind, is such an emer-
17 gency as is contemplated by the statute, what it was that delayed you in the completion of this work?

A. Delay in the decision as to whether we should use short-leaf or long-leaf yellow pine, and also the delay in the delivery of those after it having been decided, and the loss of time in the delivery of the white oaks.

Q. As I understand you, the original contract called for 311 long-leaf pine piles?

A. Yes, sir.

Q. And later 17 more became necessary by reason of the change in the construction?

A. Yes, sir. We knew on October 12, 1905, we would have to go into the market for 311 long-leaf pine piles of certain dimensions; that there might be some chance of our not getting all that we wanted promptly.

Q. That was a contingency which, to a certain extent, at least, you foresaw—a possibility, I will put it that way?

A. A possibility; yes.

Q. Where are the producers of long-leaf *white* piles?

A. Mostly in Virginia and North Carolina.

Q. How many of them are there?

A. There are 4 or 5 or half a dozen.

Q. Are those all there are east of the Mississippi, we will say?

A. They are all that I know of, that is, dealers of large capacities.

Q. Well, are there other smaller dealers elsewhere in the country?

A. I presume there are.
Q. You made no effort to find out?
A. We dealt with the large concerns.
Q. These were concerns which you had been in the habit of dealing with?
A. Yes sir.
Q. And you preferred to deal with them rather than hunt up any others?
A. We knew that their facilities were——
Q. Pardon me. And you preferred to deal with them rather than hunt up any others; is that a fair statement?
A. It is a statement. It is not a question.
Q. Did you prefer—if you object to the form in which I have put the verb, in the substantive—did you prefer?
A. We preferred to deal with the large dealers where we
18 thought we could get them quicker.
We began to drive piles about the first of June, and from that time on there was special delay in the receipt of the white oak.
Q. What was the trouble with the white oak? What was the difficulty in getting those?
A. They were very difficult piles to get in the dimensions called for by the government.
Q. That you knew when you entered into the contract?
A. Well, I didn't fully realize the extreme of it.
Q. You did realize it to some extent?
A. To some extent, yes sir.
Q. You could have realized it fully if you had informed yourself as to the condition of the market at that time?
A. Well, if I had gone into the thing with remarkable fineness I think I might have found out; yes sir.
Q. Yes; but in any of these cases, without making inquiry as to the condition of the market, you signed the contract calling for longleaf pine piles and white oak piles?
A. Yes sir.
Q. Well, wasn't it a clear case, Mr. Perkins, of taking your chances as to those things?
A. A few chances; yes sir.
We finished the pier, October 13, 1906. I remember stating to Mr. Jones that I could not have made better progress on that work and completed it more rapidly if I had employed more men 8 hours instead of employing the number of men I did employ, 9 hours. I mean to say that without any restrictions or mental reservations of any kind.
Q. I will put it in this way: Until comparatively lately, until some time after the finding of this indictment, did you make any continued experiment involving the working of men eight hours a day instead of nine, and putting more men upon the work?
A. No; not any definite experiment with that in view.
Q. Could you have worked one gang of men eight hours, and an extra gang of men for one, two or three hours in addition? Was that possible?

A. I don't think it was possible.

Q. Why not?

A. Because I think that the men who worked the two or three hours one day wouldn't work another day; they would want to get more than two or three hours' pay in.

* * * * * * *

19 Q. How much longer would it have taken to have constructed that pier if you had worked your mechanics or carpenters eight hours a day instead of nine?

A. Well, the best data that I have on it would lead me to say that it would take one-eighth longer, that is, assuming that every man worked just as hard for the nine as the eight,—that each individual man's product would be the same for each hour.

Q. It would have taken one-eighth longer?

A. Yes; but not from the fact that it is a matter of experiment.

Q. Oh, exactly. And would that be making any deduction upon the theory that a man who works eight hours today can do more work and better work tomorrow than if he worked nine?

A. Well, as I told you, provided each hour's work had the same product.

I saw the Olympia in this dry dock No. 1 about two years ago.

At the close of the testimony of the witness, the attorney for the Defendant stated that he should not expect the testimony of the Defendant to vary in any essential particular from that of the witness whom he had called, and that he therefore rested.

No admissions were made by the Defendant other than appears in the foregoing statement of evidence.

In view of the instructions to be given the jury by the court neither counsel addressed the jury. The Defendant requested the court to rule and instruct the jury as follows:

1. Sections 1 and 2 of the Act of August first, 1892, chapter 352 (27 Stat. L. 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law.

2. Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed.

3. It is competent for the jury on the evidence in the case
20 to find that there were extraordinay emergencies requiring the employment of the persons named in the different counts of said indictment and to return verdicts of not guilty under each of said counts.

4. If Pier No. 2 was being constructed as an approach to Dry Dock No. 1 and was reasonably necessary for the safe and convenient docking for repairs of ships and war vessels of the U. S., and if

without such pier there was a danger of injury and damage to such ships or vessels in docking which would not otherwise exist, and if by reason of unexpected delay in obtaining piles for the construction of said pier it became reasonably necessary to employ the persons named as mechanics in said indictment more than eight hours in one calendar day and more than eight hours on the 13th day of June, 1906, in order to complete the construction of said pier in a reasonable time and in order to lessen as soon as possible the danger of damage or injury to such ships or war vessels of the U. S. in docking the same and in order to facilitate the convenient docking of ships, then it is competent for the jury to find that an extraordinary emergency existed and that this Defendant is not guilty of the offences charged.

5. If the employment of said persons named as mechanics in said indictment more than 8 hours on said 13th day of June was reasonably necessary to prevent continued delay in the completion of said pier and substantial loss to the Defendant, then it is competent for the jury to find an extraordinary emergency requiring such employment.

6. The Defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

7. The evidence does not warrant a verdict that the Defendant is guilty of the offence charged in the first count of the indictment.

8. The evidence does not warrant a verdict that the Defendant is guilty of the offense charged in the second count of the indictment.

9. The contract of the Government with Ellis did not contain any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day.

10. The Act of 1892 under which this indictment is presented does not provide that the Act itself is to form a part of
21 every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

11. As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorized him to permit labor to be done for more than eight hours a day.

12. When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and became a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover

in an action for damages for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

13. Said Act of August first, 1892, so far as it applies to this case, is unreasonable and void.

14. Said Act, so far as it applies to this case, is repugnant to the Fifth Amendment of the Constitution of the United States and is void.

15. Said Act, so far as it applies to this case, is an unreasonable and unconstitutional interference with the rights of the people of the United States to have the Government of the United States construct its public works in a reasonable and proper manner.

16. When, by reason of an unexpected, unfor-seen or unprovided for condition, there arises a danger of loss or property or interference with business of an unusual character which it is highly important and reasonably necessary to avoid, then there exists within the meaning of said Act an extraordinary emergency.

22 The presiding judge refused to give any of instructions 1 to 15 inclusive, and declined also to give instruction 16 in the form in which it was requested. He then instructed the jury as follows:

Mr. FOREMAN and GENTLEMEN:—Most of you understand already from instructions which have been given to you here in other cases tried before you, that in a trial of this kind with a jury, questions of law are to be settled by the Court; questions of fact are to be settled by the jury. The jury take the law as it is given to them by the Court, without question. If the Court makes an error in stating the law to the jury, and if the Defendant is thereby prejudiced, he has his remedy; he can appeal, and the appellate court, whatever court it may be, will set any such error right. The jury, in considering their verdict, take the law as stated to them by the Court. Questions of fact are to be settled on the other hand by the jury. The jury's determination of questions of fact is final. The jury are to decide such questions of fact as the Court submits to them. They are to decide them according to the rules of law which the Court lays down for their guidance. All such questions as the credibility of witnesses, the comparative weight to be given to evidence upon one side of a case and on the other are questions for the jury. Those questions are indicated to them by the Court. The jury act upon them according to the rules of law which the Court lays down for their guidance.

Now, it is obvious to you gentlemen that the degree to which different cases depend upon questions of fact or upon questions of law varies. In some cases there will be very little that needs to be stated to the jury to direct them in matters of law. In such cases the question which settles the case is almost wholly an issue of fact. In other cases it is manifest that there will be very little dispute about any question of fact, so that the determination of the case will depend to a very large degree, comparatively, upon the law as laid down by the Court.

The Defendant is indicted here, and is on trial before you, for the alleged violation of a statute of the United States, passed in the year 1892, approved August 1st, 1892, which is called "An Act relating to the Limitation of the Hours of Daily Services of
23 Laborers and Mechanics employed upon the Public Works of the United States and of the District of Columbia." That act begins by providing that the services and employment of all laborers and mechanics who are or may be employed by the Government, or by any contractor or subcontractor upon any of the public works of the United States, is hereby limited and restricted to eight hours in any one calendar day. In the same section the act goes on to provide that it shall be unlawful for any officer of the United States government, or any contractor or sub-contractor whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in cases of extraordinary emergency.

Then in the second section of the Act it is provided that any contractor or sub-contractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any such public works of the United States, who shall intentionally violate any provisions of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offence shall, upon conviction, be punished; and then the law provides what the punishment shall be.

This indictment charges that this Defendant has committed the offence described in the Act of which I have spoken to you in two instances. The first count of the indictment charges that on June 13th, 1906, the Defendant being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as Pier No. 2 at the United States Navy Yard at Boston, did, as such contractor as aforesaid, then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust, to work, and said De Gaust did work on said public work for more than eight hours on a certain calendar day, to wit, on the 13th day of June, there being then and there no extraordinary emergency requiring his employment on the public work referred to for more than eight hours a day. And in the second count similar allegations are made, except that the man as to whom it is charged that he was permitted intentionally by the Defendant to work more than eight hours on June 13th was Solomon
24 Moore. Both of those men have been called as witnesses; both of them you have seen.

Before proceeding to consider just what must be proved by the Government in order to support these charges of violation of this statute, you should remember, as has been stated to you by counsel, that no individual opinions as to the policy of such a law as this are to be considered in any way. They are not to enter into your determination of the case. You may believe that it is a wise and a just law; you may believe that the public interest requires that laborers and mechanics engaged on these public works should not

be required or permitted to work over eight hours a day, or you may believe just the contrary. You may believe that it is an unwise law. You or I may hold any opinion upon that subject of which we are persuaded; but we are here to see that the laws of the United States as they stand are executed. Congress, which has the power, and is entrusted with the duty, of passing laws for the government of this country, has thought fit to enact this law, and, without any regard to opinions which any of you or I may hold about it, we are here under the sworn duty of seeing that that law is enforced.

It has been claimed in this case, although it is not a matter which has been discussed before you—that such a law as this, is a law which Congress had no right to pass. It has been contended that the Constitution of the United States forbids the enactment of such a law as this. Whether that is true or not is one of those questions of law of which I have spoken to you. The Court in this case has ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional. Therefore no such question as that is to be allowed to enter into your minds in settling the case. If the decision of the Court on that point is wrong, that also is a question which will be settled by the appellate court, and it is a question in regard to which the rights of the Defendant will be fully protected in that way. We have nothing to do with that question here.

There has been a decision, gentlemen, by the Supreme Court of the United States upon this question of constitutionality,—not a decision upon this particular statute, but a decision regarding a State statute, a statute, I think, enacted by the legislature of the State of Kansas, somewhat similar—nearly the same—in its provisions. The Supreme Court of the United States, in holding that the Kansas law to which I have referred was constitutional,—that there is nothing in the Constitution of the United States which forbade the legislature of Kansas to enact it,—said that "It may be that the State intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics and workmen upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them to better discharge the duties appertaining to citizenship." It may be fair in this case to assume that Congress, in enacting this law, had the same intention as was there referred to by the Supreme Court of the United States.

In proceeding to the consideration of the question whether the Defendant has been proved guilty or not of violating this statute, it is important to notice the different elements constituting the offence which the Government must show to have existed in order to establish his guilt of the offence charged. The statute, as you have noticed, makes a number of different elements necessary in

order to constitute the offence. It is incumbent upon the Government to prove those elements, as they are alleged in the indictment which I have read to you, beyond a reasonable doubt.

Most of you have learned already from the instructions given you here in other cases, what is meant by a reasonable doubt. You have been told that a reasonable doubt is not a purely fanciful, hypothetical or imaginary doubt, not such a doubt as can be imagined in regard to almost any question that can be put; but it means, in opposition to that, such a doubt as a reasonable man allows, exercising his reason, to affect him in the important affairs of his life. The elements of this offense, therefore, must be proved beyond a reasonable doubt in that sense.

Now, what are the elements which go to constitute this
26 offence? I will run them over briefly.

In the first place, the Government must prove beyond a reasonable doubt that the Defendant was under contract with the United States, or its duly authorized agent.

It must prove that the work to be done under the contract was a public work of the United States.

It must prove that the Defendant was under duty,—bound by his contract,—to employ mechanics, and did employ, or cause to be employed, the persons named in the two counts of the indictment as mechanics.

It must prove that the person employed was a mechanic.

It must prove that the Defendant intentionally required or permitted such mechanics to work more than eight hours in any calendar day during the construction of the work, and before the finding of the indictment.

And lastly, it must prove that no case of extraordinary emergency existed which justified the Defendant in requiring or permitting such mechanic to work more than eight hours in any one calendar day on such public work, the statute containing the provision which I have read to you, "except in case of extraordinary emergency."

All those things are necessary elements of the offence charged. All those things are to be proved beyond a reasonable doubt. I instruct you, gentlemen, as requested by the Defendant, that "it is the duty of the jury to return a verdict that this Defendant is not guilty of any offence charged in this indictment, unless the offence therein charged is proved beyond a reasonable doubt."

"Even if the jury should believe from the evidence in the case that it is probable that this Defendant is guilty of any offence charged in this indictment, it is nevertheless their duty to return a verdict of not guilty, unless they are also satisfied beyond a reasonable doubt of his guilt."

"It is the duty of the jury to return a verdict that the Defendant is not guilty of the offence charged in said indictment unless it is proved beyond a reasonable doubt that there was no extraordinary
emergency requiring the employment of the persons named
27 in said indictment more than eight hours on the 13th day of June, 1906."

Now, gentlemen, in regard to some of these elements to be proved

by the Government beyond a reasonable doubt, there have been admissions made here during the trial on behalf of this Defendant. The admissions cover some of the elements which I have told you are necessary to be proved beyond a reasonable doubt by the Government. Let us see what these are.

The first element to which I referred was this: The Defendant must have been under contract with the United States, or its duly authorized agent. The Defendant has admitted that he was a contractor with the United States for the construction of this Pier No. 2, and the contract has been put in evidence here before you. I instructed you, secondly, that the work to be done under the contract must be proved to be a public work of the United States. The Defendant has admitted that Pier No. 2, which he contracted to build, was a public work of the United States.

I instructed you that it must be proved that the Defendant was bound by his contract, that he was under a duty, to employ mechanics, and did employ, or cause to be employed, the persons named in the different counts of the indictment. The Defendant admitted that it was his duty to furnish labor for that public work under the contract, and that in performing that duty he did employ De Gaust and Moore, who are the persons named in those two counts.

I told you that it was necessary to prove that the person employed was a mechanic. The Defendant has admitted that each of these men was a mechanic.

I instructed you that it must be shown that the Defendant intentionally required or permitted such mechanic to work more than eight hours in any calendar day during the construction of the work, and before the finding of the indictment. It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of the offence are present, that would be an intentional violation of the statute on the Defendant's part.

If the Defendant intended to permit these men to work over
28 eight hours on the calendar day named, then he intended to violate the statute, and there seems to be thus far no question that the elements to which I have referred already are established here.

It remains to be established, and established also, like all the other elements referred to, beyond a reasonable doubt, that there was no case or extraordinary emergency, such as is contemplated by the Act, which would justify the Defendant requiring or permitting these men to work more than eight hours. This is the last element necessary to constitute the offence, the last element the existence of which it is incumbent upon the Government to satisfy you beyond a reasonable doubt.

What then, is a case of extraordinary emergency, such as is contemplated in this act of Congress? Upon that point, I instruct you that an extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt

action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an "extraordinary emergency" such as the statute contemplates.

It will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency.

Now, gentlemen, there is before you, in regard to the existence of a case of extraordinary emergency, the evidence introduced by the government, and also the evidence introduced in behalf of the Defendant.

I instruct you, that you would be justified, on the government's evidence alone, provided that you believe the witnesses who have testified for the government—and the extent to which witnesses are to be believed or disbelieved is always a question for
29 the jury—I instruct you that, providing that you believe them, you are justified, on the government's evidence alone, in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the Defendant in requiring or permitting these men to work more than eight hours on June thirteenth. The circumstances which are disclosed by the government's evidence and the Defendant's admissions are sufficient to negative the existence of a case of extraordinary emergency such as would afford that justification to the Defendant, or such as would justify him in permitting the men to work over eight hours, as he has admitted he did.

In addition to the evidence introduced by the government, the Defendant has introduced evidence here which you have heard, which was offered for the purpose of showing, and which it is claimed does show, that such a case of extraordinary emergency did exist.

I instruct you that the evidence so introduced by the Defendant is not sufficient for the purpose, and that it does not show the existence of any case of extraordinary emergency.

Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; or which would authorize working them over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case, taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offence charged.

To each refusal to rule and instruct the jury as requested the Defendant seasonably excepted. The Defendant also seasonably excepted to the Judge's charge so far as the same differed in form and substance from the instructions requested.

The Defendant also seasonably excepted to the definition given by the court of an extraordinary emergency, that is to say—to the following instruction contained in said charge.

30 "What, then, is a case of extraordinary emergency, such as is contemplated in this act of Congress? Upon that point, I instruct you that an extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an "extraordinary emergency" such as the statute contemplates.

Now, it will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency."

The Defendant also seasonably excepted to the ruling and instruction in said charge that—

"Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case, taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offence charged."

The Defendant prays that his exceptions may be allowed.

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

Allowed; December 22, 1906.

FREDERIC DODGE,
Judge U. S. District Court.

And now, on this twenty-second day of December, A. D. 1906, it is considered by the Court that the said William H. Ellis do pay a fine of Two Hundred Fifty Dollars on the first count of said In-

dictment, and Two Hundred Fifty Dollars on the second count of said Indictment, and to stand committed until the same be paid.

A true Record:

Attest: FRANK H. MASON, *Clerk.*

31 *Petition for Writ of Error.*

(Filed December 22, 1906.)

To the Honorable the Judge of the District Court of the United States *of* the District of Massachusetts:

Now comes William H. Ellis, the Defendant in the above entitled cause, and complains that in the record and proceedings and also in rendition of judgment in a plea between the United States and the Defendant, tried in the District Court of the United States for the said District, at the September Term, A. D. 1906, in which a judgment was rendered against him on the eighteenth day of October, A. D. 1906, manifest error hath happened, to the great damage of said Defendant.

Wherefore he prays for the allowance of a Writ of Error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

32 *Assignment of Errors.*

(Filed December 22, 1906.)

And now comes William H. Ellis, the Defendant in the above entitled cause, and files this his Assignment of Errors committed upon the trial of said cause, to wit:

1. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's first request, namely, that

Sections 1 and 2 of the Act of August 1, 1892, c. 352 (27 Stat. at Large, 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law.

2. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's second request, namely, that

Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed.

3. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's third request, namely, that

It is competent for the jury on the evidence in the case to find that there were extraordinary emergencies requiring the employment of the persons named in the different counts of said indictment, and to return verdicts of not guilty under each of said counts.

4. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's fourth request, namely, that

If Pier No. 2 was being constructed as an approach to Dry Dock No. 1 and was reasonably necessary for the safe and convenient docking for repairs of ships and war vessels of the United States, and if without such pier there was a danger of injury and damage to
33 such ships or vessels in docking which would not otherwise exist, and if by reason of unexpected delay in obtaining piles for the construction of said pier it became reasonably necessary to employ the persons named as mechanics in said indictment more than eight hours in one calendar day and more than eight hours on the 13th day of June, 1906, in order to complete the construction of said pier in a reasonable time and in order to lessen as soon as possible the danger of damage or injury to such ships or war vessels of the United States in docking the same and in order to facilitate the convenient docking of ships, then it is competent for the jury to find that an extraordinary emergency existed and that this Defendant is not guilty of the offences charged.

5. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's fifth request, namely, that

If the employment of said persons named as mechanics in said indictment more than 8 hours on said 13th day of June was reasonably necessary to prevent continued delay in the completion of said pier and substantial loss to the Defendant, then it is competent for the jury to find an extraordinary emergency requiring such employment.

6. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's sixth request, namely, that

The Defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

7. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's seventh request, namely, that

The evidence does not warrant a verdict that the Defendant is guilty of the offense charged in the first count of the indictment.

8. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's eighth request, namely that

The evidence does not warrant a verdict that the Defendant is guilty of the offence charged in the second count of the indictment.

9. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's ninth request, namely, that

The contract of the Government with Ellis did not contain
34 any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day.

10. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's tenth request, namely, that

The Act of 1892 under which this indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

11. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's eleventh request, namely, that

As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorizes him to permit labor to be done for more than eight hours a day.

12. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's twelfth request, namely, that

When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and became a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover in an action for damage for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

13. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's thirteenth request, namely, that

Said Act of August first, 1892, so far as it applies to this case, is unreasonable and void.

14. The Court erred in refusing to rule and instruct the
35 jury in accordance with the Defendant's fourteenth request, namely, that

Said Act, so far as it applies to this case, is repugnant to the Fifth Amendment of the Constitution of the United States and is void.

15. The Court erred in refusing to rule and instruct the jury in accordance with Defendant's fifteenth request, namely, that

Said Act, so far as it applies to this case, is an unreasonable and unconstitutional interference with the rights of the people of the United States to have the Government of the United States construct its public works in a reasonable and proper manner.

16. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's sixteenth request, namely, that

When, by reason of an unexpected, unfor-seen or unprovided for condition, there arises a danger of loss of property or interference with business of an unusual character which it is highly im-

portant and reasonably necessary to avoid, then there exists within the meaning of said Act an extraordinary emergency.

17. The Court erred in ruling and instructing the jury in form and substance differing from the request of the Defendant, as follows:—

"It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment, and I instruct you, gentlemen, that if all the other elements of the offence are present that would be an intentional violation of the statute on the Defendant's part. If the Defendant intended to permit these men to work over eight hours in the calendar day named, then he intended to violate the statute, and there seems to be thus far no question that the elements to which I have referred already are established here."

18. The Court erred in ruling and instructing the jury that

"An extraordinary emergency such as is contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be
36 sudden, unusual, imminent and actual in order to constitute an extraordinary emergency such as the statute contemplates.

Now, it will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency.

19. The Court erred in ruling and instructing the jury that provided the jury believed the witnesses, they were justified on the government's evidence alone, in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the Defendant in requiring or permitting these men to work more than eight hours on June 13th. The circumstances which are disclosed by the government's evidence and the Defendant's admissions are sufficient to negative the existence of a case of extraordinary emergency such as would afford that justification to the Defendant, or such as would justify him in permitting the men to work over eight hours, as he has admitted he did.

20. The Court erred in ruling and instructing the jury that the evidence introduced by the Defendant is not sufficient to show that a case of extraordinary emergency within the meaning of the statute did exist, and that it does not show the existence of any case of extraordinary emergency.

The Court erred in ruling and instructing the jury as follows:

"Therefore, gentlemen, on all the evidence in the case which

is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case,
37 taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offense charged."

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

38 D. C.—Form 148.

Bond on Writ of Error.

Filed December 22, 1906.

Know all Men by these Presents, That we, William H. Ellis of Boston in the Commonwealth of Massachusetts, as principal, and The United States Fidelity and Guaranty Company, a corporation duly organized under the laws of the State of Maryland and having a usual place of business in Boston, as surety, are held and firmly bound unto The United States of America in the full and just sum of Two Hundred and Fifty (250) Dollars to be paid to the said The United States of America, its certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of December in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between The United States of America by Indictment against said William H. Ellis judgment was rendered against the said William H. Ellis and the said William H. Ellis having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear in the Supreme Court of the United States, in the city of Washington, on the third Monday of January next

Now, the condition of the above obligation is such, That if the said William H. Ellis shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. ELLIS. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.
T. J. FALVEY &
GEO. W. BERRY, [SEAL.]
True and Lawful Attorneys.

Sealed and delivered in presence of
FRANK H. CARRUTHERS,
As to William H. Ellis.
D. R. PENNELL,
As to Surety.

Approved:
FREDERIC DODGE,
Judge U. S. District Court.

39 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Unied States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, on the third Monday of January next, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Massachusetts in a cause entitled United States by Indictment, Number 444, *versus* William H. Ellis, Defendant wherein the said defendant is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge Judge of the District Court of the United States for the District of Massachusetts, this 22nd day of December, in the year of our Lord one thousand nine hundred and six.

FREDERIC DODGE,
U. S. District Judge.

40 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *December* 22, 1906.

I hereby certify that on the twenty-second day of December, 1906, I accept service of the within citation, and acknowledge due and legal service of the same.

ASA P. FRENCH,
United States Attorney.

41 District Court of the United States, District of Massachusetts.

No. 444.

UNITED STATES BY INDICTMENT
vs.
WILLIAM H. ELLIS.

Order that Writ of Error Operate as a Supersedeas.

December 22, 1906.

DODGE, *J.:*

Whereas lately sentence has been pronounce- against William H. Ellis, the Defendant under said indictment, and a Writ of Error procured by the said Defendant to reverse the judgment in this cause; and

Whereas a Citation to the United States to be and appear at the Supreme Court of the United States at the City of Washington pursuant to said Writ of Error has been issued, and has been served on the Attorney of the United States for this District.

It is Ordered that the said Writ of Error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said Writ of Error.

By the Court:

FRANK H. MASON, *Clerk.*

A true copy:
Attest: FRANK H. MASON, *Clerk.*

42 District Court of the United States, District of Massachusetts.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS, Defendant.

Order Admitting Defendant to Bail Pending Writ of Error.

December 22, 1906.

DODGE, *J.:*

Whereas, lately at the said District Court sentence was pronounced against the said Defendant, and the said Defendant having obtained a Writ of Error to remove the said cause to the Supreme Court of the United States, at Washington, to reverse the judgment therein, and a citation having been issued to the United States to be and appear at the said Supreme Court of the United States at Washington pursuant to said Writ of Error, which citation has been served upon the Attorney of the United States for said District.

It is Ordered that the said Defendant be admitted to bail pending said Writ of Error, and that he recognize with sufficient surety in the sum of one thousand dollars.

By the Court:

FRANK H. MASON, *Clerk.*

A true copy:
Attest:
FRANK H. MASON, *Clerk.*

43 UNITED STATES OF AMERICA,
Massachusetts District, ss:

Memorandum.

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the first Tuesday of December in the year of our Lord one thousand nine hundred and six. To wit: December 22, 1906.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

Personally appeared William H. Ellis of Boston and Frederick E. Newell of Hingham and John J. Walsh of Boston all in said District, and acknowledged themselves to be severally indebted unto the United States of America, in the sums following, viz: the said William H. Ellis as principal in the sum of one thousand dollars, and the said Newell and Walsh as sureties in the sum of one thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said United States, if default be made in the performance of the Condition here following

Whereas, the said William H. Ellis, Defendant has this day been ordered to be admitted to bail pending the Writ of Error issued in this cause, returnable to the Supreme Court of the United States at Washington on the third Monday of January next.

Now, the condition of this Recognizance is such, that if the said William H. Ellis shall personally appear before the District Court of the United States to be holden at Boston, within and for the District aforesaid whenever required after the Mandate of the said Supreme Court of the United States shall be received in this cause to answer to such matters and things in the premises as shall be objected against him on behalf of the said United States, and more especially to such judgment as shall be awarded against him therein, and shall do and receive that which by this Court
44 shall be enjoined upon him in relation to the premises and not depart without license, and shall meanwhile from term to term and day to day appear in this Court whenever lawfully re-

quired in relation to the premises then the above obligation to be void and of no effect, otherwise to abide in full force, power and virtue.

Attest: FRANK H. MASON, *Clerk.*

A true copy:
Attest: FRANK H. MASON, *Clerk.*

45 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Frank H. Mason, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled,

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

in said District Court determined, the Petition for Writ of Error, the Assignment of Errors, the Bond to the United States on Writ of Error issued on said Petition, and also the original Citation issued on said Writ of Error, with the Acknowledgment of Service thereon; also true and attested copies of the Order that said Writ of Error operate as a Supersedeas, the Order Admitting Defendant to Bail pending Writ of Error, and the Recognizance of Defendant.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this tenth day of January, A. D. 1907.

[Seal of the District Court, Massachusetts.]

FRANK H. MASON, *Clerk*

Endorsed on cover: File No. 20,532. Massachusetts D. C. U. S. Term No. 567. William H. Ellis, plaintiff in error, *vs.* The United States. Filed January 16th, 1907. File No. 20,532.